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Blakely v. Washington and the Evolution of Trial by Jury

Amy Michaelson
Honors Project
April 29, 2005
"No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed--nor will we go upon or send upon him--save by the lawful judgment of his peers or by the law of the land."26

Introduction

It should come as no surprise that the creation of the United States Constitution was a painstaking and lengthy process. The Framers of our nation’s laws and the great composers of America’s most important documents aimed to protect America’s future from the fates of the lands their families had fled. In particular, their focus included ideals like the freedoms of speech and religion and, in the event of tyranny, any formidable shield for the people to employ against the oppression of an overaggressive government. From that arose the Constitution of the United States of America and, specifically, the Bill of Rights.

As generally understood, America extracted its legal system from the British legal system of common law. In doing so, America parted with most of the rest of the world that operates under a civil law system. The idea behind common law is to establish laws through the Doctrine of Precedent or stare decisis; in other words, like cases are decided alike. While this general concept pervaded the
American system, other legal traditions survived as well.
One, of such great importance that the Writers included it
in Article III, Section II of the Constitution, is the
right of American citizens to a trial by jury.

The trial by jury was the British solution to corrupt
and, by modern standards, asinine “fact-finding” methods
from 500 CE to 1215 CE. During that time in the Middle
Ages, England employed various methods of fact-finding, but
two of particular consequence are methods known as trial by
ordeal and trial by battle.¹ Many associate trial by
ordeal with “witch-hunting,” given mainstream attention in
the last few decades by a scene in the British film Monty
Python and the Holy Grail. In the film, a suspected witch
must compare her weight with that of a duck. The judge in
the case declares that, by some disconnected logic, if she
weighs the same as a duck, she can float and must be made
of wood like a witch. While most of the movie is a farce,
this particular scene illustrates a situation that could
have easily occurred. Many trials in the Middle Ages
assumed similar protocol. Some accused persons were thrown
into water, a test in which floating resulted in hanging
and, of course, sinking resulted in drowning. Others were
set on fire. In Shakespeare’s Richard III, the Coroner
utilizes a method called “the bier.” This method presumes
that the victim’s body can detect the presence of his/her killer, and, in the presence of the killer, the victim’s wounds reopen and bleed again. Shakespeare writes: “O gentlemen see, see! Dead Henry's wounds/Open their congealed mouths and bleed afresh!”\textsuperscript{34} The justification of these methods lied in Christian assumptions that God would not allow the innocent to suffer. In 1215, however, church leaders in the Lateran Council forbade these practices, thereby eliminating the justification of trial by ordeal. Another technique, trial by battle, sought to solve disputes through a duel.\textsuperscript{23} It was a brutal legal technique in which the victor won a legal battle merely by living through the duel. While it applied seemingly primitive and flawed logic to the law, some accounts describe former President Andrew Jackson solving his own civil disputes this way just 160 years ago.\textsuperscript{1}

In the aftermath of a system that was both logically flawed and frequently corrupt, trial by jury provided a haven for the accused, at least on the surface. Like many recognized freedoms today, the Magna Carta was the monumental document that first guaranteed the right of the accused to trial by jury.\textsuperscript{26} Trial by jury as outlined in the Magna Carta and as exercised by the British courts differed from today’s American trial by jury procedurally and
operationally. However, the intended purposes of a trial by jury as a safeguard against a corrupt or potentially corrupt government can be understood by the presence of the trial by jury notion in the Magna Carta—a document whose explicit purpose was to protect the rights of the British people from an unpredictable and unjust government.

**Trial by Jury’s Identity during the Establishment of American Law**

"That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."\(^{10}\)

As the importance of the jury trial idea is evident from its presence in Article III, Section II of the Constitution proper, note also that in 1789, the Writers included provisions of the trial by jury practice in Amendments V, VI, and VII of the Bill of Rights.

Amendment V, the “Rights in criminal cases” amendment, states that no person shall be tried for a capital or an “infamous” crime without the presence and indictment of a Grand Jury, unless that person is acting on behalf of the armed forces in time of war or “public danger.”\(^{9}\) In 1937, in Palko v. Connecticut, the Supreme Court ruled that the right to a jury trial was not fundamental, as the Court
suggested that the presence of a jury is not necessary to the execution of a fair trial and the promotion of "ordered liberty." As found also in Snyder v. Massachusetts, the Court in Palko states that eliminating juries altogether in the state courts does not threaten the "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." In Duncan v. Louisiana of the 1960s, the court revoked the Palko assumption and deemed juries as "being fundamental to the American scheme of justice," thereby making a trial by jury a right. While this seems to guarantee the right of all accused Americans to a jury trial, the Supreme Court also clarifies in that decision that "petty offenses" do not warrant the fact-finding of a jury. Petty offenses, as designated in that decision, consisted of all offenses punishable by fewer than six months and by a fine of less than $500.

Amendment VI, the "Right to a fair trial" amendment, guarantees the accused to a speedy trial and an impartial jury. This is possibly the most obvious departure from the actuality of the British practice of trial by jury. The Writers of the Bill of Rights wanted to codify the intention that all juries should be impartial and selected at random. At the time of the writing of the Bill of
Rights, only white men could be chosen as potential jurors. Trials in the 20th century deal more fairly with jury selection as a result of actions of the court in the 1970s.

Amendment VII, the “Rights in civil cases” amendment, states that no accused person in a trial that involves a contention of more than $20 shall be denied a trial by jury. Of course, as in many decisions regarding trial by jury, again, the Court leaves room for interpretation and exception. In Baldwin v. New York of 1970, the Court expounded upon this amendment and changed the minimum fine to $500. Courts deviate from this rule in cases involving corporations and/or defendants other than specific individuals. In Muniz v. Hoffman of 1975, the court ruled that a labor union, fined for $10,000, was not entitled to a jury trial, as $10,000 spread amongst its members constituted a fine of less than one dollar per member. In addition, the court is reluctant to award a jury trial to corporations that incur fines over $500, especially if that corporation’s illegal behavior resulted in significant income. In all other cases, unless waived by the defendant, juries decide the fates of their fellow citizens in what many people call the most significant check ordinary people can execute on the government.
Sentencing Reform

"1980s: the heyday of mandatory sentences"\textsuperscript{13}

Throughout the course of American history, many efforts have been undertaken to ensure the equality and rights of all and the protection of all from the potential abuses of the government. Of additional significance, though, is the reality that America has not always succeeded to that end. Slavery, the inequality of women and minorities, and the eradication of the Native American population are enduring reminders of the flaws in the American system and, of course, the impetuses for much social change that continues even in the 21\textsuperscript{st} century. Due process and fairness in trial, while designed with noble intentions, have not escaped fallibility. Sentencing disparities, accentuated by a disproportionate number of blacks on death row, abound. In 1987, members of Congress sought a solution to these problems through the establishment of a uniform sentencing scheme.\textsuperscript{33}

In 1973, Marvin Frankel wrote a book entitled \textit{Criminal Sentences: Law Without Order}, which is widely noted as the book that highlights the movement for sentencing reform. Frankel’s book proposed a “calculus” to aid in making
sentencing more objective. Senate Judiciary Chairman Edward Kennedy, a liberal, took notice of Frankel’s work and, with conservative Senators McClellan and Thurmond, strove for the acceptance of the first Federal Sentencing Guidelines as part of the Sentencing Reform Act of 1984. In the creation of the bill, Kennedy proposed the creation of a commission, whose members would be appointed by the U.S. Judicial Conference. Kennedy’s proposal also included a provision that the guidelines be advisory—not mandatory. The final draft, when passed, established the legislative means for a mandatory sentencing scheme, which was to be composed by a sentencing commission whose members were appointed by the President, Ronald Reagan. This was the birth year of the Federal Sentencing Guidelines. While the accepted Act differed only slightly from Kennedy’s proposal, time would find those small changes causing major problems for the future of sentencing.

**Federal Sentencing Guidelines**

“The decision clearly came down on the "mandatory" side, notably excepting the provision allowing departure from the guideline range for exceptional aggravating or mitigating factors.”³³
Federal Sentencing Guidelines are not unlike a customizable pizza. For example, as shown in Table 1, a cheese pizza would symbolize the base crime. Then, as the pizza takes on other elements, such as toppings, crust-styles, quality, and delivery, the cost would increase, much like a defendant’s sentence escalates with the addition of various elements to the base crime in

Table 1.37

<table>
<thead>
<tr>
<th>Pizza</th>
<th>Sentencing Guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cheese Pizza</td>
<td>$5.00</td>
</tr>
<tr>
<td>+ Pepperoni</td>
<td>+ .75</td>
</tr>
<tr>
<td>+ Special Crust</td>
<td>+ 1.25</td>
</tr>
<tr>
<td>Total</td>
<td>$7.00</td>
</tr>
<tr>
<td></td>
<td>Robbery</td>
</tr>
<tr>
<td></td>
<td>+ Gun</td>
</tr>
<tr>
<td></td>
<td>+ Injury to Law</td>
</tr>
<tr>
<td></td>
<td>Enforcement</td>
</tr>
<tr>
<td></td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>3 years</td>
</tr>
<tr>
<td></td>
<td>+ .75 years</td>
</tr>
<tr>
<td></td>
<td>+ 5 years</td>
</tr>
<tr>
<td></td>
<td>8.75 years</td>
</tr>
</tbody>
</table>

sentencing. The aim of reform was to eliminate disparities in sentencing between two instances of the same or similar crimes by specifying exactly what sentence a particular crime and combination of factors could warrant. Since the adoption of Federal Sentencing Guidelines in Mistretta v. United States27, many states have developed their own sentencing schemes, which will be examined further.

The key constitutional consideration when deciding on the constitutionality of the Sentencing Guidelines in
Mistretta was whether the Commission that designed the guidelines improperly violated the delegation-of-powers principle. The Commission, in essence, had legislated the guidelines, thereby exceeding their power as they had not been elected to the Commission by the people. Justice Scalia, in his opinion, dubbed the commission a “junior-varsity” Congress. With that decision, it would appear that all disparities in sentencing should have been eradicated within the scope of the Constitution, but all constitutionality challenges had not been exhausted.

State Sentencing Schemes

State courts were not immune to the disparities experienced in the federal court system. For that reason, many states established their own sentencing schemes. Here is a list of states that have established some kind of numeric system.
### States with Sentencing Schemes

<table>
<thead>
<tr>
<th>Alaska</th>
<th>Minnesota</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>New Jersey</td>
</tr>
<tr>
<td>California</td>
<td>New Mexico</td>
</tr>
<tr>
<td>Colorado</td>
<td>North Carolina</td>
</tr>
<tr>
<td>Idaho</td>
<td>Ohio</td>
</tr>
<tr>
<td>Indiana</td>
<td>Oregon</td>
</tr>
<tr>
<td>Kansas</td>
<td>Tennessee</td>
</tr>
<tr>
<td>Michigan</td>
<td>Washington</td>
</tr>
</tbody>
</table>

Though state sentencing schemes do not mirror the Federal Guidelines, most do with respect to procedural provisions if not substantive as well. Some states employ a voluntary system that encourages judges to sentence within a certain range, but if a judge departs from that range, the law only requires that they adequately document their reasons for any departures.\(^{35}\)

### Prison Situation

During election years, politicians openly promote the use of the sentencing scheme and mandatory sentences because it demonstrates a commitment to fighting crime. Before these politicians can imprison criminals, though, the national prison infrastructure must be able to accommodate this influx. As of 2005, American prisons held
2,130,181 people, or approximately the population size of Houston, Texas. Because of sentencing schemes and mandatory sentences, the prison population is at an all-time high. Some view this as evidence that the sentencing structure is working to put criminals in prison. Others see it as needless expenditures to incarcerate non-violent criminals (i.e., persons charged with possession of marijuana) and, in some cases, an injustice to the accused.

**Apprendi v. New Jersey**

"...because they are black in color he does not want them in the neighborhood."

Charles Apprendi, Jr. fired a gun through the window of the home of an African-American family in New Jersey. During questioning, he asserted that he disliked the family because of their race. He then entered a plea bargain. Because of Apprendi’s comment about the family’s race, Apprendi’s behavior could then be construed as a hate-crime. The prosecution requested that the judge consider the enhancement by a preponderance of the evidence. The judge enhanced the sentence, and the defense contested it.
According to the defense, the court denied Apprendi his due process because a jury must prove the motive of “hate”. In addition, the motive of “hate” must be proved beyond a reasonable doubt. An appeals court upheld the decision and, therefore, allowed judges to perform fact-finding by a preponderance of the evidence and enhance sentences.

The Supreme Court reversed the ruling, siding with the defense. In this ruling, the Supreme held the Federal Sentencing Guidelines constitutional but ruled that judges could not depart upward beyond the statutory maximum, except of course to reflect prior offenses. The Court ruled that these elements must be submitted to a jury, and the jury must find those elements to exist beyond a reasonable doubt.

**Blakely v. Washington**

"The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "'the unanimous suffrage of twelve of his equals and neighbours'".

As apparently predicted by Justice O’Connor, more appeals would arise to contest aspects of the Federal Sentencing Guidelines. In the case of Blakely v.
Washington, the Washington sentencing scheme came under the scrutiny of the court. How this decision would affect the Federal Guidelines is still not completely clear.

Ralph Blakely, a documented schizophrenic, and his wife co-owned several pieces of real estate in Washington and Montana. Upon hearing that she had filed for divorce, Blakely kidnapped his wife at knife point, bound her, and forced her into a box in the back of his pick-up truck. He then directed that his son follow them in another vehicle. The son eventually sought help, and when Blakely crossed the Montana border, police arrested him. The state charged him with two counts of kidnapping involving domestic violence. In exchange for the dismissal of one count and the reduction of the remaining charge to “second-degree,” Blakely pled guilty.

In accordance with the sentencing scheme of Washington, the judge considered Blakely’s crime as well as any possible aggravating factors. Upon deliberation, the judge determined that Blakely acted with “deliberate cruelty,” increasing his sentence beyond the standard range. In fact, the prosecutor suggested 53 months, which is the maximum sentence within the standard range. The judge assigned the necessary sentence at 90 months, based,
by a preponderance of the evidence, on his conclusion that Blakely acted with "deliberate cruelty."\textsuperscript{19}

\textbf{What the Ruling Means}

After the Blakely ruling, a roar of questions erupted from the media, state governments, the Federal government, defense attorneys, prosecutors, and judges at every level. States were not sure if the Blakely decision that deemed the Washington state scheme applied to their own sentencing schemes. Legislatures even called emergency sessions to discuss the potential ramifications of the decision. The Federal Courts were also in disarray. All of these parties had something to lose or gain from the Blakely decision.

\textit{Figure 1.}\textsuperscript{38}
Blakely Affects the Justice System Stakeholders

Many participants in the legal arena feel strongly for and against the Blakely decision. Defense attorneys are vehemently in favor of the decision. They felt that they had been the most restricted by the guidelines because the guidelines allowed for upward departure but not downward. Defendants' rights groups had long fought the implementation of the guidelines because they feel the guidelines violated the due process rights of their clients. Chief Judge William G. Young says the justice system under the guidelines "has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen."22

Prosecutors were strong proponents of sentencing schemes because they felt that the guidelines accomplished two important tasks: punishing criminals and reducing sentencing disparities. Arguably, power had shifted from the defense attorney to the prosecutor. While prosecutors feel they could lose their power from the ruling in Blakely, Justice Breyer, Supreme Court Justice and member of the original commission that created the Federal...
Sentencing Guidelines, feels that a likely solution to the Blakely problem will result in prosecutors garnishing even more power.\textsuperscript{4}

Judges have varying feelings about the Blakely decision. Effectually, the guidelines inhibited judges’ power by mandating that judges’ deliver a minimum sentence. Since Congress established the Guidelines, judges have been fighting back. According to two reporters from the Wall Street Journal writing on Budlife420.com, “U.S. District Judge Jack Weinstein of Brooklyn has been videotaping all of his sentencing proceedings so that when an appeals court reviews his downward departures, it can view defendants on tape to get a feel for their character.”\textsuperscript{8} In Tennessee, though, 84% of judges are opposed to changing the current scheme simply because the alternatives will be cumbersome to explore.\textsuperscript{18}

**Split Supreme Court Decision in Blakely**

The Supreme Court Justices split the Blakely decision 5-4 with the majority led by Justice Scalia who was joined by Justices Stevens, Souter, Thomas, and Ginsberg. The dissent adamantly defended their arguments, demonstrating that the Blakely ruling is probably not as obvious as it
seems. One concern raised by the dissent is that without sentencing schemes, states may begin using 17-element crimes. A 17-element crime is a way to convert a scenario in which a crime and enhancing factors (determined by a judge) exist into a scenario in which all the enhancing factors are called elements. The dissent’s problem with 17-element crimes is the expense of submitting all 17 elements to a jury. Justice Scalia responds that 17-element crimes are exactly what the Constitution evokes, so they should not be dreaded but rather embraced as a way to ensure constitutionality in sentencing. The dissent also expresses concern that “elements” will be the “tail which wags the dog of the substantive offense.” In a humorous answer, Scalia notes: “To be sure, Justice BREYER and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog.” Scalia continues by attempting and failing to find even a single relationship between sentencing and dog tails.

Individually, Justice O’Connor contested Scalia’s originalist rationale. As Scalia claims that the Framers would prefer a jury find any fact, Justice O’Connor argues that the Framers had no understanding of the magnitude of judicial discretion the judiciary now has, and because of
that, the Framers are not a frame of reference for deciding who, judge or jury, should decide sentencing enhancements. Justice Breyer, the Justice on the Sentencing Reform Commission in the 1980s, declined to agree that the Constitution requires all facts to be submitted to a jury in the first place. Furthermore, he argues that submitting all facts to a jury would undermine fairness. Most importantly, Breyer and O'Connor join on this fact: the practices that make the Washington scheme unconstitutional are also present in the schemes of other states and the Federal Guidelines.

Because of the urgency of finality, the Supreme Court expedited its review of two cases now known as Booker and Fanfan. In the decisions of these cases, it found mandatory guidelines that allow for judicial fact-finding unconstitutional.

Reaction

Several predictions have been made about the aftermath of the Blakely decision. Firstly, sentencing guidelines will be made voluntary, thus, destroying a 20-year effort to create uniformity in sentencing. Next, the legislatures would set higher maximum sentences; therefore, giving the
judge the ability to enhance a sentence within the range of the maximum. Another result could be bifurcated jury systems. Lastly, schemes could be scrapped altogether.²⁰

After Blakely, Tennessee Courts had to find a solution. The state instituted a bifurcated jury system, which means that a jury decides guilt or innocence in one phase and the enhancement factors in the other.¹⁶ The judge then must take into account the jury-found enhancement factors in imposing a sentence. While this is a victory to opponents of sentencing schemes, some consider it a loss to citizens of Tennessee. Many feel that criminals will not serve adequate jail time. Others feel that jury duty will be even more intolerable.¹⁶ The last gripe about the Blakely ruling is that while it prohibits a judge’s fact-finding, it does not prevent that judge from shortening a sentence or finding mitigating factors. In that way, the situation has caused a power shift from prosecutors to the defense.²⁰

**Confidence in Jury Competence**

Blakely was an important victory for the trial by jury ideal. Blakely demonstrates a commitment by the Supreme Court to uphold the Constitution’s guarantee of trial by
jury against arguments of exorbitant cost and inconvenience. In addition, this in an era in which many American view the Supreme Court justices and many Federal Court judges as “activists.” Still, the Supreme Court upheld the trial by jury as a worthwhile safeguard to protect from sentencing schemes—and maybe even popular opinion. Since the Rodney King and OJ Simpson criminal trials of the 1990s, the public has questioned the ability of juries to uphold the law. Legislators in California have sought ways to curb jury power by allowing non-unanimous juries, establishing a guilty/not guilty/not proven verdict system, and imposing a four-hour minimum time limit for deliberation. While none of these resulted in any proposed legislation, it shows the beginning of a trend of disbelief in the ability of jurors to apply the law.

More recently, many have questioned the ability of jurors to perform their duties in the face of extremely complex evidence. White-collar crime, medical malpractice, patent infringement, and intellectual property involve technical vocabulary and intense understanding, and many doubt the ability of jurors to understand the language, much less make determine a verdict. President George W. Bush blames juries for driving doctors out of the medical
field. He stated in a speech in Pennsylvania in 2003, “Excessive jury awards will continue to drive up insurance costs, will put good doctors out of business or run them out of your communities...” This clamor surrounding the incompetence of juries in civil suits has evoked investigations into the constitutionality and viability of professional jury panels and award caps. While this debate continues, judges are now looking for more ways to make jury duty more tolerable, by paying juries more, and looking for more ways to give them more power in the courtroom. The role that the jury will play in the future has yet to be determined.

Conclusions

As the intention of the Framers was to create an elastic Constitution that would stand the test of time, a growing problem is how America can adapt within its confines. The population, technology, the ease of dissemination of information, complexity of global commerce, and the intricacy of forensic evidence of the modern age have tested the Constitution that was written in a much simpler time. The Framers could not understand the need for a sentencing structure nor how a strand of hair
can prove a verdict incorrect. The Framers could not have foreseen men flying airplanes into buildings or even airplanes. It was not the intention of the Framers to prescribe the future of America but only to keep it in line with certain ideals.

The task of remaining within Constitutional constraints has proven expensive, difficult, and emotional. Justices must interpret the law by the letter of precedent in the presence of vehement disapproval and scrutiny. Justices are essentially the levee guiding a raging river that frequently changes course within the boundaries of the Constitution. As America changes course and progresses, it stays its course with the help of the law. When America oversteps its Constitutional boundary in a freak incident, it breaches the levee but eventually recedes because of the power of judicial review. Justices are not infallible, and the Supreme Court has admitted mistakes by overturning decisions over time. Its recent refusal to buckle under the pressure of public opinion is either an indication of the Supreme Court perfecting its role as the protector of the people against itself, an indication of stubborn elitism, or an indication of the Supreme Court helping to shape legislation to keep it consistent with the Constitution.
Blakely is an example of the Supreme Court using its insight to help sentencing legislation, but some view it as activist judges being overprotective of the accused. Regardless of the actuality, Blakely is one example of how a social fight will impact sentencing and all legal battles of the future. As Tom DeLay calls for a time for “the men responsible [judges] for this to answer for their behavior [in the Terri Schiavo case],” Americans should brace themselves for a different time. The legal field will change as mainstream America loses faith in the effectiveness in the Constitution and patience with those that attempt to uphold it. Because it has proven elastic through the gauntlets of history, the Constitution will win the hearts of Americans again.
Bibliography


2Apprendi v. New Jersey, 120 S. Ct. 2348.

3Baldwin v. New York, 90 S. Ct. 1886


11Duncan v. Louisiana.


27 Mistretta v. United States. 108 S. Ct. 2867.


30 Palko v. Connecticut. 58 S. Ct. 149.


37 This is an example of the sentencing scheme concept. All representations are completely fictional and overly simplistic.

38 Gray states have no scheme. Purple states have systems that are completely unaffected by Blakely.